United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-2122

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-2122

PAUL MOYNAHAN,
Plaintiff-Appellee

vs.

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLANT'S PETITION FOR REHEARING AND/OR REHEARING IN BANC

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PETITION FOR REHEARING
AND/OR REHEARING IN BANC

Appellants respectfully request that this case be reheard by the original panel which heard the appeal (affirmed the decision of the United States District Court by order entered May 31, 1977) or, in the alternative, be reheard by the full Court.

Reasons for this request are as follows: (1) the affirmance is inconsistent with decisions of the United States Supreme Court and with decisions previously entered by this Court; (2) the affirmance represents a misapplication and misinterpretation of the constitutional dictate of Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974); (3) the affirmance is inconsistent and inconsonant with the teaching of United States v. Agurs, ___ U.S. ___, 96 S.Ct. 2392 (1976); (4) reconsideration by the original panel, or, in the alternative, reconsideration by the full Court in banc is absolutely necessary to secure and maintain uniformily or consistency in the decisions of this Court; (5) the decision involves questions of constitutional mandate and application which are extremely important and critical to law enforcement and prosecutorial personnel in the State of Connecticut; (6) the appeal involves constitutional questions of exceptional importance in that the District Court's broad interpretation of Davis v. Alaska, supra, and its retrospective application of that case, will open the floodgates to an onslaught of habeas petitions and proceedings brought by state prisoners in this District.

STATEMENT OF THE CASE

Appellee was convicted in the Connecticut Superior Court of the crime of receiving stolen goods in violation of the then operative §§53-63 and 53-65 of the Connecticut General Statutes. On March 4, 1970, appellee, the deputy police superintendent of the Waterbury, Connecticut Police Department, was sentenced by that Court. In a 43 page decision announced on April 5, 1973, the Connecticut Supreme Court affirmed the conviction. 164 Conn. 560. After several actions concerning post-conviction relief in the state courts, appellee instituted the present action in the United States District Court for the District of Connecticut in November, 1973. The District Court granted the requested relief in a memorandum of decision filed on August 31, 1976 and its judgment filed on September 3, 1976. From this decision appellant appealed to this Court which affirmed on May 31, 1977.

The criminal trial in the state Superior Court developed as follows. John Bishop, who was in jail awaiting sentencing on a charge of conspiracy to commit larceny, testified that on April 8, 1967, he broke into an appliance store in West Haven, Connecticut and took at least one television set. He went directly to the home of Charles Vernale, who "fenced" goods for him, and put the television in Vernale's garage. He returned a week later for payment; at that time he and Vernale delivered the set to the home of the defendant Paul

Moynahan; he testified that this set was the one he had stolen. Bishop had previously seen the defendant at Vernale's house; the defendant had said that he didn't care what Bishop and Vernale did so long as they didn't do anything in Waterbury. Bishop testified that he had been told that the sentencing judge in his criminal case would be made aware of his testimony.

During cross-examination, copies of Bishop's statements to the police and to the investigative grand jury were ordered to be delivered to the defendant. All of the prior statements of John Bishop were turned over to the defense.

There was testimony that a smashed television had been found in Plymouth, Connecticut on March 27, 1969. Evidence of a repair was found.

Edward Miller, a television repairman, testified on direct that he repaired the set at the defendant's home on a Sunday in the summer of 1967. Miller had described the work to the police in February, 1969, and didn't see the set between 1967 and March, 1969. In March, Miller viewed the smashed set which had been found in Plymouth and verified that the repair was his. The entire direct examination consumed only twenty transcript pages.

The details of the direct examination of this witness was as follows: Miller testified that he had been employed for seventeen years as a television repairman and, on a summer Sunday morning in 1967, had repaired a Motorola 23 inch color

T.V. set (Early American cabinet, maple finish) in the front sunroom of appellee's home. This witness described the nature of the repair in great detail: he repaired the set by opening a metal box in the chassis, removing the coil, soldering the broken wire, covering the wire with electrical tape to hold it in place and finishing the repair by soldering the metal box. The witness identified appellee as being present at the time he repaired the T.V. set. According to Miller, upon completion of the repair, appellee examined the set, expressed satisfaction and paid the witness a fifteen dollar repair.

Miller further testified that on three dates in February of 1969, he was interviewed by the Connecticut State Police regarding the repair he had made in 1967 at appellee's home. He described the set and he described for the police the full details of the repair stating how he had removed the metal cover of the interior box, soldered the wires of the coil, taped the wires, and then re-soldered the cover of the metal box in place.

Miller also testified that in April of 1969, the State Police took him to the Town Garage in Plymouth to examine a damaged T.V. set; he examined the set and told the officers it was the same set he had repaired at appellee's home in 1967. Miller informed the police that if they opened the soldered metal box, they would find the wire in the coil soldered and

the black plastic tape he had used to cover the soldered wire. Miller testified he was present when the authorities removed the metal cover and he observed the wire in the coil which he had soldered and the black plastic tape which he had told the police would be visible on the interior coil.

At the commencement of Miller's cross-examination, appellee's counsel established that Miller had given three transcribed statements to the State Police and that he had testified before the one-man Grand Jury. Thereafter, in the absence of the jury, the trial court inquired as to the scope of appellee's cross-examination to which defense counsel responded: "We would seek to cross-examine Mr. Miller to establish a fixed motive in his mind which would be indicative of untruthfulness." The jury was recalled and cross-examination resumed with Miller stating that, prior to going to appellee's home, he had repaired other Motorola sets in 1967 and that his store also sold them.

On continued cross-examination, Miller testified as follows: he understood appellee had called him to make the repair since appellee's regular repairman was unavailable on Sunday; this was the only occasion on which Miller ever repaired any T.V. set in appellee's home; Miller had met appellee once before at the home of Charles Vernale who was a customer of Miller's store. When Miller was asked if Vernale was a customer in 1967, the jury was excused so the State's objection to this line of inquiry could be considered by the court. Appellee argued that his purpose in developing cross-examination "along

these lines is merely for the purpose of possible erroneous identification or exposure to the set at other places." Defense counsel further stated: "In other words if he [Miller] were having transactions with Mr. Vernale with respect to repair work or, frankly, ... acquisition of sets, from him, this raises in my mind that we are placing the man in a position where the man has had business dealings with the man whom the State, through its witness, has identified as being a person who had possession of this set." Thereafter, the following colloquy occurred between the Court and the prosecutor:

> Mr. Gaffney:Now, Mr. Hennessey says this is the line of questioning that he wants to get here. Why doesn't he get this right away? He can just ask the man: Did you ever repair this set at Mr. Vernale's house? It is that simple.
>
> The Court: Mr. Gaffney, he has a right, as counsel, as you well know, to develop testimony in his own way. The Court has no right to restrict him unreasonably, so that I will allow these questions.
>
> **********
>
> The Court: Gentlemen, I would ask you this, to bear in mind the fact that we do have to discuss these matters in the absence of the jury. In the interest of saving time, and I believe both of you are experienced trial counsel and know the rules of evidence, and I ask you to adhere to the rules so that it will not be necessary to continuously excuse the jury.
>
> However, I am not going to unduly restrict either one of you. I believe that these are questions which are proper on cross-examination, and I will allow them.
>
> Mr. Gaffney: May I have an exception?

The Court: Exception may be noted.

The Court: We will take the morning recess at this time.

When the jury returned, Miller was permitted to testify, over the State's objection to each question, as follows: he went to Vernale's house about three times in 1967, once to repair an antenna, once to repair a radio and phonograph, and once to repair a 21 inch Zenith console; in 1967, at Vernale's request, he repaired two other color T.V.s, a Magnavox and an Admiral. After 1967, Miller testified he did not see Vernale very much: "I hadn't seen him at all after that period of time." Defense counsel next asked: "Now, during the period of 1967, did you sell any color television sets which you obtained from Mr. Vernale?" The State again objected and the following appears on the record:

> The Court: What is the purpose of this question, Mr. Hennessey?
>
> Mr. Hennessey: I am seeking to determine whether or not a mistake might not have occurred, that could it not have been possible for this gentleman to have obtained a set which he resold which might have been this set which the State has sought to place in Mr. Vernale's possession.
>
> The Court: The objection is overruled. An exception may be noted.

The witness answered the question in the affirmative; when asked how many sets, the trial court again overruled the State's objection and Miller answered: "There were two." Next, the defense inquired as to the identity of persons to whom the two sets were sold; when the State objected, the court stated: "This

is cross-examination. Proper latitude is allowable. I will allow it." Miller testified the two sets were sold to a Mr. Stevens and a Mr. Gasparri. Appellee then asked the witness whether, in 1968, he had sold any color television sets obtained from Vernale; Miller answered "No." Appellee then inquired: "Do you have in your records any documents relating to the purchase of those color television sets?" The State objected and the following transpired:

> The Court: What is the purpose of this question, Mr. Hennessey?
>
> Mr. Hennessey: Well, I am seeking to determine again, your Honor, whether or not this man may have other documents or information in his possession which would be of assistance to me with respect to the question of identification.
>
> Mr. Gaffney: Identification of what, this particular set? I don't follow his reasoning, your Honor. We have talked about all the other sets except this particular set.
>
> Mr. Hennessey: Could I be heard on that, if your Honor pleases?
>
> On repeated occasions Mr. Gaffney has sought to limit me to this set. I think it is obvious, your Honor, what our defense is, and I don't think that our case rests solely on this set.
>
> Mr. Gaffney: If the Court pleases, the defendant's case is not before the Court. The State's case is before the Court, and the State's case is based on this set and this man has testified as a State's witness on direct examination. His examination was limited to this particular set, and I submit it should be limited to that scope.
>
> The Court: I think the last question is remote, Mr. Hennessey. I will sustain the objection to the last question.

Miller's brief direct examination was conducted during the course of the court day on January 20, 1970; it consumed only twenty-two pages (22) of transcript. Cross-examination of Miller commenced January 20, 1970 and continued through January 21st; cross-examination of this witness consumed one hundred eighty-seven pages (187) of transcript. During that morning of January 21, Miller was further cross-examined in great detail and at great length concerning the nature of the repair he performed at appellee's home and claimed inconsistencies between his testimony and prior statements to the police. When the Court recessed at 1:00 P.M. for lunch, Miller was still being cross-examined; prior to recalling him to the stand when court reconvened after lunch, defense counsel advised the court: "we are going to bring Mr. Miller back and I hopefully request that I be able to ask those questions in the absence of the jury which may cause some concern." The court agreed to the so called "dry run" and, in the absence of the jury, the judge overruled the State's objections to all but three of the questions. The defense never undertook to ask the non-objectionable dry run questions (where the State's objection was overruled) again in the presence of the jury. The reason is obvious considering the answers Miller gave to those questions.

In the dry run, Miller testified that when he received the two television sets from Vernale which he subsequently sold to Gasparri and Stevens, he did not know they were stolen; that when he was first questioned by the police he was not told he

was under investigation for anything; that no one made any promise to him as to what might occur if he testified; that there were no conversations about promises; that at no time was he apprehensive about the questioning; that he told the police he would be willing to cooperate; that he was questioned about the Petitioner's transaction and several others; that at no time during these questionings was there any suggestion that he was under investigation; that in his own mind he did not think he was under investigation; that no one ever said or suggested to him what would happen if he did not cooperate; that no promises or threats were made to him about the Lanza, Griffin, Stevens, Gasparri or MacIntosh matters, now, at any time did he feel that he was under investigation for any of these; that he kept no books or records of those transactions.

The trial court sustained the State's objections only to the following three questions: "At any subsequent inquiry were you told by any member of the police or any member of the State's Attorney's office that you were under investigation?"; "How much was paid to Vernale for the two sets?"; "Whether he received invoices when he received the sets from Vernale?" The entire dry-run consisted of a total of thirty-six questions; the State's objections were overruled by the experienced state trial judge on all but the last three questions. On that record, the District Court granted federal habeas relief finding a constitutional abridgement on the basis of Davis v. Alaska, supra, and this Court affirmed.

After the completion of the "dry-run," appellee's attorney said "Well, I didn't want to ask the question in their [jury's] presence." The court had suggested that those questions to which objections had been sustained be omitted from the reporter's reading. The State objected to the idea of a non-adversary interrogation before the jury whereupon the appellee's attorney announced "I won't go into this line of inquiry at all." To this, the trial judge replied: "Then that solves the whole problem." Accordingly, the Connecticut Supreme Court ruled that the defense had strategically abandoned this line of inquiry. Considering counsel's statement, the reaction of the trial judge, and the answers the witness had given to the questions asked by the defense, this was a perfectly sound and reasonable conclusion.

As stated, when the jury returned, appellee continued and, subsequently, completed his cross-examination of Miller. At no time were any of the dry-run questions or other questions asked of this witness relating to any bias or prejudice.

Against this testimonial background, the United States District Court held, approximately six and one-half years after appellee's conviction and over three and one-half years after the affirmance of the conviction by the Connecticut Supreme Court, that an experienced state trial judge impermissibly restricted the cross-examination of this witness in violation of the constitutional mandate of Davis v. Alaska, supra. It took the District Court three years from the filing of the habeas petition to arrive at this decision.

The District Court also held a comment made by the police in the course of the questioning of Edward Miller on February 18, 1969 was exculpatory, apparently on the basis that the comment suggested that Miller had originally been a potential target of the investigation. There had been no requests for any statements prior to trial. During his direct testimony, Miller had stated he had been interviewed by the Connecticut State Police early in the investigation. At the commencement of his cross-examination, the defense moved for the production of all of Miller's prior statements. At that point there was extensive discussion concerning the proposed scope of the cross-examination. The resulting order does not appear in the trial transcript; however, the state court finding in the record before the Connecticut Supreme Court (that finding is included in the record before this Court) indicates that the trial judge ordered the prosecution to turn over "any matter which might be of assistance to the accused."

An examination of Edward Miller's statements to the police of February 17, 18, and 21, 1969, and of his Grand Jury testimony clearly shows the rationale on which certain portions of the February 18th statement were selected for disclosure. In general, the portion of that statement dealing with the Moynahan transaction was disclosed; the portions of the statement dealing with other persons were not. The undisclosed portion of the statement which the District Court held to be fatal is set forth in footnote #20 of that Court's opinion; in essence, it

amounts to one sentence (seventeen words) out of a statement running some sixty-five pages in length: "square away Ed Miller...Otherwise, we're going to have to start looking at Ed Miller a little stronger."

The above statement was introductory and succeeded the interview of the previous day following which the police authorities were dissatisfied with the material furnished by Miller. Essentially, the February 18th interview was conducted in the following setting. On the previous day Miller had told them that he had sold two sets that he had received from Vernale. The police were obviously trying to develop information about other sets. They told Miller that they were looking for the truth, that they already knew that he had handled two sets that were stolen, and they thought he may have handled more. They said they were going to find out the truth with or without Miller's help, but they preferred his held. Significantly, Miller stuck to the same story he had told the day before and would repeat again: he had received only two sets from Vernale. Thus, he told the same story regardless of the pressure applied; similarly, his testimony at trial was consistent with these statements.

An examination of the statement of Edward Miller on February 21, 1969, is perhaps even more revealing. The police more or less accused Miller of selling two more sets, but Miller adhered to his original statement. This statement was disclosed to the defendant.

During cross-examination, in the context of the identity of the repair, Miller was asked by the defense whether "...the State Police made inquiry of you with respect to this transaction." The answer was in the affirmative. The three statements and the Grand Jury testimony were used by the defense in an effort to discredit Miller's recollection that the repair was made at the defendant's home. Using the statements, the defense was able to bring some initial difficulty on Miller's part in remembering the make of the set which he had repaired for the defendant. Thereafter, the statements were used by defense counsel to tie Miller to Vernale and the jury heard from a reading of the statements, the admonition by Sgt. Courtney (Conn. State Police) to Miller: "Come clean with me on Moynahan."

Again using the statements for purposes of cross-examining Edward Miller, the defense elicited that he had told the police that he had sold two other sets he had received from Vernale, and, that at one time Miller had stated, and later retracted, that he had sold a third Vernale set. Additionally, the state trial judge admitted into evidence the statements of the police interviews as prior inconsistent statements. Thus, the jury had all this before it and one must question how the quoted seventeen words conceivably could have been used by the defense "to give rise to a reasonable doubt that did not otherwise exist."

Nevertheless, the District Court held that even though substantial portions of the Miller statement were delivered

to and used by the defendant at trial, the state withheld exculpatory evidence. The state argued that the defendant already knew of the extent of Miller's alleged criminal involvement and, in any event, whatever possibly exculpating material was not disclosed, did not meet the standard enunciated in United States v. Agurs, supra.

ARGUMENT

I. APPELLEE'S RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WAS NOT ABRIDGED BY THE STATE TRIAL JUDGE'S CLAIMED LIMITATION OF THE CROSS-EXAMINATION OF A PROSECUTION WITNESS

The Sixth Amendment guarantees the right of a defendant in a criminal case "to be confronted with the witnesses against him" and this basic right is secured for defendants in state prosecutions through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). Quite obviously, the very essence of the right protected by the confrontation clause is the right to adequately and effectively cross-examine prosecution witnesses. Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968); Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966); Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965). Included in the constitutionally protected right of confrontation is the cross-examiner's entitlement to expose bias, prejudice, and/or improper motivation on the part of a given prosecution witness since such considerations are relevant in weighing the credibility of the witness's testimony. Davis v. Alaska, supra; Green v.

McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959); Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

The District Court's reliance on Davis v. Alaska was misplaced. In Davis, a "crucial" prosecution witness (person who identified the defendant) was on probation as a result of a juvenile court adjudication; under Alaska law, such probationary status was entitled to complete confidentiality and, although readily known about by defense counsel, could not be revealed through cross-examination. Following affirmance of Davis' conviction by the Alaska Supreme Court, certiorari was granted by the United States Supreme Court to consider:

> whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent when such impeachment would conflict with the State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. Davis v. Alaska, 415 U.S., supra at p. 309.

The Supreme Court reversed the Alaska court stating: "In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness and his family] by disclosure of his juvenile record...is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (Emphasis added). Davis v. Alaska, 415

U.S. supra at p. 319. In a separate opinion, Mr. Justice Stewart concurred with the majority holding "in the circumstances of this case." Davis v. Alaska, 415 U.S. supra at p. 321.

More specifically, Davis had been convicted of grand larceny and burglary in regards to the theft of a two foot square safe from a bar known as the Polar Bar in Anchorage. Richard Green was the crucial witness for the prosecution. He had a juvenile record stemming from burglary of two cabins and at the time of Davis' trial was on probation. A protective order was entered prior to the testimony prohibiting any reference to Green's juvenile record by the defense in the course of cross-examination. Chief Justice Burger's opinion, quoting from the trial transcript a portion of Green's cross-examination, emphasized the fact that the protective order effectively left unchallenged Green's "protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorial denial of ever having been the subject of any similar law-enforcement interrogations." Citing the fact that the confrontation clause includes the right to a meaningful cross-examination, the Court concluded:

> As in Alfrod, we conclude that the State's desire that Green fulfill his public duty to testify freely from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself. Davis v. Alaska, 415 U.S.,supra at p. 320.

The tenor of the Davis decision is a balancing of the

state's desire to maintain the secrecy of juvenile records and the right of a defendant to effectively confront and cross-examine the key witness against him. The Court struck the balance at a point where the witness was permitted to use the protective order to commit perjury. Cf. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). Here, the District Court's unwarranted and very expansive interpretation of the constitutional rule established by Davis merely amounts to another extraordinary example of an experienced state trial judge being "second-guessed" by a federal court on routine evidentiary rulings made many years before during the course of state criminal litigation.

The right to cross-examine for purposes of establishing witness bias, prejudice, special interest, and/or improper motive is well-established in Connecticut law. State v. Luzzi, 147 Conn. 40 (1959); Atwood v. Welton, 7 Conn. 66 (1828). Similarly, it has long been recognized that the scope of cross-examination is matter properly and necessarily within the sound discretion of the trial judge and rulings in this regard are to be overturned only upon a clear showing of abuse. State v. Luzzi, supra. This court, in rejecting a Davis claim (on direct review), has also reiterated these basic and established rules of evidence: "The extent of cross-examination of a witness is normally resolved by the trial judge in the reasoned exercise of his discretion." United States v. Finkelstein, 526 F.2d 517, 529 (2d Cir. 1975). In the instant case, by granting the writ, the District Court

determined, on this record, that the state trial judge not only abused his discretion, but that such abuse was of constitutional magnitude. Appellant contends that this conclusion finds no support in either the record or in existing legal precedent.

Here, appellee was permitted to cross-examine Miller about repairs he had made at the request of Vernale, about his business relationship (in 1967) with Vernale, and about the two sets he had obtained from Vernale and later sold. Thus, the trial judge, over the State's objections, permitted cross-examination into the witness' business dealings with Vernale, and, to the extent that these demonstrated questionable motivation deriving from possible criminal complicity, the details were fully before the jury. Additionally, had appellee so chosen, he could have asked those "dry-run" questions to which objections were not sustained when the jury returned. His reason for not choosing to do so is apparent on the basis of the answers he received to those questions when they were propounded outside the jury's presence. Only when the cross-examination became clearly repetitious (were you told that you were under investigation? - witness had already testified that he did not believe he was under investigation) and far afield (what he paid Vernale for the two sets, and, whether he had invoices from Vernale) did the trial judge sustain the State's objections to this line of cross-examination.

This Court, in United States v. Finkelstein, supra has had occasion to evaluate a Davis claim very similar to the one

presented here (witness' improper motive stemming from Government's promise not to prosecute in exchange for witness' testimony). Although the federal trial judge had repeatedly sustained the Government's objections to the defendant's attempts to examine the prosecution witness concerning the existence of Government promises, this Court affirmed the conviction and distinguished Davis stating:

> In Davis, the witness probationary status suggested a possibility that he conferred with the police prior to taking the stand. The witness' denial of such conversations appeared to be of questionable truthfulness, and serious damage to the prosecution's case would have been a real possibility if further cross-examination had been permitted. (Emphasis added). United States v. Finkelstein, supra at p. 529.

In this case, there was absolutely no basis for reasonably concluding that Miller's testimony was probably perjurious. Furthermore, based on Miller's answers to the questions propounded during the "dry-run," it is apparent that no serious damage would have resulted to the State's case even had the trial judge seen fit to have allowed the cross-examination to continue ad infinitum. Thus, the affirmance of the District Court opinion is inconsistent with the previous decision of this Court in United States v. Finkelstein, supra.

The Court below held, that continued cross-examination of Miller would have established that he "was vulnerable to pressure from the police and prosecutors" and was forced "to alter or color his testimony." Such contention overlooks the peculiar nature of Miller's testimony which, in itself, rendered the testi-

mony manifestly reliable. This witness testified that in February of 1969 he furnished the police with information concerning the repair he had made in 1967 to the set in appellee's home. He described for the police all the details of the repair: the removal of the metal cover from the metal box that housed the sound coil, the soldering of the wire on the sound coil, the taping of the wire, the re-soldering of the metal cover to the box. A few months later, when the police recovered the set a few miles from appellee's home, Miller testified he was present when the set was examined; the police removed the metal cover to the box and found exactly what Miller had stated they would find; the re-soldered metal cover, the black tape, and the soldered wire. This evidence, by its own nature, was extremely reliable; regardless of how much additional cross-examination the trial judge allowed concerning Miller's motive in testifying, it could not have affected the inherent reliability of this important testimony. Thus, unlike the situation in Davis, there was absolutely no reason here to believe that Miller had testified untruthfully.

Here, the record reveals that the state trial judge permitted a lengthy and searching cross-examination of Miller. In the exercise of his discretion, the trial judge properly assumed that further cross-examination into the witness' subjective thoughts would not be meaningful considering the inherent reliability of Miller's testimony, and, the extent to which his business relationship with Vernale had already been developed. United

States v. Bastone, 526 F.2d 971 (7th Cir. 1975); United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975).

II. DAVIS v. ALASKA SHOULD NOT BE APPLIED RETROSPECTIVELY

Appellee's conviction became final when it was affirmed by the Connecticut Supreme Court on April 5, 1973. The petition for federal habeas relief was filed in the United States District Court on November 5, 1973. The United States Supreme Court decided Davis v. Alaska, supra, February 27, 1974.

In Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967), the Supreme Court stated:"The retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based;" rather, the guiding criteria are: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard.

In determining whether Supreme Court proclamations of constitutional principle are to be given retrospective application, that Court has also stated: "Where the major purpose of new constitutional doctrine is to overcome an aspect of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule should be given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed. 2d 388 (1971). However, in Stovall, the Court declined to give retroactive effect to

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967), and, Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967), although the Sixth Amendment principle expounded in those cases was "aimed at avoiding unfairness of the trial by enhancing the reliability of the fact-finding process in the area of identification evidence." Stovall v. Denno, 388 U.S. supra at p. 298.

While recognizing that any Supreme Court decision dealing with matters related to cross-examination of witnesses can be said to concern possible "impediment of the truth-finding function," and may place in question the accuracy of previous guilty verdicts, appellant nevertheless contends that Davis should not have been given retrospective application by the District Court. Extended to its very broadest interpretation (as in the District Court's Memorandum of Opinion), Davis v. Alaska gives rise to a constitutional issue any time there is any restriction of cross-examination of a prosecution witness in the area of bias, interest, motive, etc. To the extent that this very broad interpretation of the District Court is correct, Davis represents a new rule of constitutional law which abrogates the heretofore relied upon principle of trial court discretion. Undoubtedly, the issue will now be raised (and has been) on federal habeas whenever a state trial judge limits inquiry into any collateral matters which imaginative counsel can somehow tie into a claim of witness bias, motive, etc. The affirmance in the present case will have the effect of opening wide the

floodgates for innumerable habeas petitions in both the state and federal courts grounded on Davis claims. This will result in an additional burden on the District Courts and present an unnecessary and undesirable threat of greatly increased federal reivew of mere evidentiary rulings by state judges. Cf. Schaefer v. Leone, supra at p. 185. Such clearly was not the intention of Chief Justice Burger in Davis.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE TRIAL COURT VIOLATED BRADY v. MARYLAND, 373 U.S. 83 (1963) AND ITS PROGENY BY FAILING TO DISCLOSE TO THE DEFENSE INFORMATION INDICATING, ACCORDING TO THAT COURT, THAT THE POLICE WERE AT ONE TIME LOOKING AT THE WITNESS MILLER.

The most recent Supreme Court case dealing with exculpatory evidence is United States v. Agurs, ____U.S.____, 96 S.Ct. 2392 (1976). Justice Stevens reviewed the three categories of cases covered by Brady v. Maryland, 373 U.S. 83 (1963). One is the knowing use of perjured testimony. The second is the failure to produce evidence that would be material in the sense that it might affect the outcome of the trial despite a specific request for production. The third situation is that in which no specific request is made, but the obvious exculpatory nature of the evidence should alert the prosecutor to the duty to disclose. United States v. Agurs, supra, 2398-99.

"The heart of the holding in Brady is the prosecution's suppression of evidence ..." Moore v. Illinois, 408 U.S. 786, 794 (1972). "[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the

knowledge held by the defense." Giles v. Maryland, 386 U.S. 66, 96 (1967) (Whate, J., concurring). "The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him." United States v. Ruggiero, 472 F.2d 599, 604 (2d Cir. 1973).

It is absolutely clear that the defense was aware of Miller's possible jeopardy. In the course of requesting the prior statement, counsel for the defense said, "We know from our own investigation of three instances where Mr. Miller sold color television sets to individuals in the Waterbury area, Mr. Stevens, Mr. Gaspari, and Mr. Lanza. It is our understanding as well that one of these gentlemen, at least, was subsequently charged by the State's Attorney's Office with the crime of receiving stolen goods, based upon the fact that he did receive a stolen color T.V. set from Mr. Miller. However, to the best of our knowledge, Mr. Miller was not charged, although he, in fact, was the seller ..." A serious contention that the defense had no idea that the police may have said that they may have to take a look at Ed Miller is almost incredible.

Although the defense may not have known the precise seventeen words used by the police on February 18, it is clear that they knew Miller's situation. They knew that Miller had been interrogated three times by the police and again in the

grand jury. They knew and developed in cross-examination that Miller had received two television sets from Vernale, and that at least one of the recipients of the sets had been arrested for receiving stolen goods. "This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court..." Giles v. Maryland, supra, 98 (Fortas, J., concurring).

In United States v. Agurs, supra, the traditional balancing between the good or bad faith of the prosecutor and the materiality of the evidence was rejected. Cf. United States v. Keough, 391 F.2d 138 (1968). Instead, the sole issue to be considered is the character of the evidence. United States v. Agurs, supra, 2400. Materiality in the Brady context may be deemed to be the effect that the evidence would have had if it had been disclosed. . "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record." United States v. Agurs, supra, 2401-02.

The impact that the addition of the precise seventeen words used by the police at one point during the February 18 interview would have had on the jury verdict is, at best, obviously minimal. The jury knew that, at least one sense, the police were looking at Ed Miller: three interviews and a grand jury appearance constitute more than casual interest. The jury knew that Miller had sold at least two other sets which he had

obtained from Vernale, and that the police had questioned him rather closely about those sets. They knew that there was some association between Miller and Vernale. They knew that the police had advised Miller to "come clean" wtih them on Moynahan. They knew that the sales of the two sets had not been recorded.

Since the jury in the instant case knew of Miller's possible criminal involvement and of the tenor of his examination by the police, the addition of the "withheld" testimony would not seem in any way to be able to create any reasonable doubt not otherwise entertained. See also United States v. Brawer, 367 F.Supp. 156, 170, 172 (S.D.N.Y. 1973); aff'd, 496 F.2d 703 (2d Cir. 1974); United States ex rel Fein v. Deegan, 410 F.2d 13 (2d Cir. 1969).

> The jury had all the facts essential for a fair appraisal of Maucelli's testimony before them. The Court is satisfied that, in light of all the evidence, (citations omitted) and in the context of the entire trial, (citations omitted) the undisclosed stateements would not have enabled the defendants to so present their case that they would probably create a reasonable doubt as to their guilt in the mind of a conscientious juror. The probability that disclosure of the statements to the defense would have altered the result is zero. Defendants received a fundamentally fair trial. 'The pans contain weights and counter-weights other than the interest in a perfect trial.' United States v. Keough, supra, 391 F.2d at 147, quoting Kyle v. United States, 297 F.2d 507 (2d Cir. 1961). United States v. Brawer, supra, at 367 F. Supp. 177.

The District Court merely concluded that the undisclosed 17 words "in [its] estimation, gave rise to a reasonable doubt as to petitioner's guilt," and, therefore, "that he was deprived of due process" by the non-disclosure. The District Court did not discuss how the statement of the investigating police officer: "square away Ed Miller . . . Otherwise, we're going to have to start looking at Ed Miller a little stronger," could have been used by the defense to create a reasonable doubt which did not otherwise exist. It is submitted that defense counsel could have accomplished nothing more even had he had in his possession these precise words used by the investigating officer. At best, he could have simply framed a question to Miller as to whether the police had, in fact, made the quoted statement to him during the February 18 interview. It is inconceivable how that alone would create a reasonable doubt, particularly since the substance thereof was already before the jury, and, considering the answers given by Miller on the "dry run."

For the reasons stated aforesaid, it is contended that the utilization of the precise 17 words by the defense would be, at best, merely cumulative, and, that any effect it might have on the jury which would be beneficial to the accused is extremely and extraordinarily speculative. This Court's affirmance on this record decrees due process requirements far beyond the traditional concepts of fairness and well into the

realm of absolute perfection in the trial of criminal cases. Such is certainly not consistent with Judge Friendly's learned analysis in United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) and overlooks the applicability of the following language, previously used by this Court, To the instant case:

> The [state] prosecutor made many disclosures to the defense and there is nothing in the record which suggests that his conduct as well as that of his staff, under difficult circumstances did not amply satisfy the fundamental concepts of due process necessary in order to provide the defendant with a fair trial. (Emphasis Added). United States ex rel Fein v. Deegan, supra, at p. 20.

CONCLUSION

For the reasons stated aforesaid, it is respectfully urged that this case be reheard by the full Court, or in the alternative, by the original panel.

THE APPELLANT, JOHN R. MANSON.

BY _____
JOHN F. MULCAHY, JR.
DEPUTY CHIEF STATE'S ATTY.

BY _____
ROBERT E. BEACH, JR.
ASST. STATE'S ATTORNEY

CERTIFICATE OF SERVICE

It is certified that three (3) copies of the Petition for Re-Hearing and/or Re-Hearing In Banc have been mailed, postage prepaid, to Edward Hennessy, Esq., and James Wade, Esq., Robinson, Robinson & Cole, 799 Main Street, Hartford, Conn. on June 14, 1977.

JOHN F. MULCAHY, JR.

ROBERT E. BEACH, JR.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of May one thousand nine hundred and seventy-seven

Present:

HONORABLE WILFRED FEINBERG

HONORABLE JOHN A. DANAHER
Circuit Judges

HONORABLE JOHN F. DOOLING, JR.
~~Circuit~~ Judges,

PAUL MOYNAHAN,

Petitioner-Appellee,

- against -

JOHN MANSON, Commissioner of Corrections for Connecticut,

RESPONDENT-Appellant.

Docket No. 76-2122

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Blumenfeld, dated August 31, 1976, 419 F. Supp. 1139.

Wilfred Feinberg
WILFRED FEINBERG

John A. Danaher
JOHN A. DANAHER, Circuit Judges

John F. Dooling, Jr.
JOHN F. DOOLING, JR. District Judge